IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,
Bankrupt.

PURCELL SAFE COMPANY, a corporation,
Appellant,

vs.

NELSON W. PARKER as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,
Appellee.

No. 2055

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLEE

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PRESS OF P. L. ALLEN

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ARGUMENT.

The question presented is the validity of a certain writing claimed by the appellant to be a contract of conditional sale. Pursuant to stipulation between the appellant and the appellee, the safe

deposit boxes mentioned in the writing have been sold, with the agreement that the lien (if any) of the appellant shall be impressed upon the moneys in the possession of the trustee.

The material section of the statute of the State of Washington relating to conditional sales is correctly set forth on page 4 of appellant's brief. That section has been construed by this Court (*In re American Machine Works, Chilberg vs. Smith,* 174 Fed 805, 23 A. B. R. 483), and by the Supreme Court of the State of Washington (*American Multigraph Sales Company vs. Jones,* 109 Pac. 108, 58 Wash. 619), and a strict rule of construction has been adopted. By those decisions the rule of property has been established for the State of Washington that a conditional sale of personalty placed in the possession of the vendee shall become absolute unless a memorandum, stating the terms and conditions of the sale and signed by both parties, shall be filed, within ten days after taking possession, in the office of the county auditor of the county in which the vendee resided at the time he took possession. It is essential that the memorandum shall be signed by both the vendor and the vendee.

In this case the memorandum was an order addressed to the appellant and signed by S. C. Osborn Co. and by S. C. Osborn. The order was as follows:

THE GENUINE HALL'S SAFE & LOCK CO.'S SAFES.

Read this contract before signing.

Seattle, Wash., Feb. 16, 1910.

Purcell Safe Co.

Seattle, Wash.

Please deliver the one group of 1020 safe deposit boxes built for us and already in freight depot in Seattle, marked to S. C. Osborn & Co., Town of Seattle, County of King, State of Wash., via team, for which we agree to pay to your order the sum of ($5,174.00) five thousand one hundred and seventy-four dollars, as follows: $2,000.00 cash paid this day and a note for the balance, $3,174.00, for 12 months from this date bearing interest at 7% per annum; for safe delivery at 507 Third Ave., Seattle, Wash.

The undersigned agree to forward the cash payment, together with the notes above described, to you upon arrival of safe, failing in which the whole amount shall become due and payable immediately. It is further agreed that the undersigned shall not permit the same to be removed from the place above mentioned, nor injured, nor taken by any other person or process. And it is agreed that you do not part with, nor relinquish your claim on, or title to, said safe, until the cash or deferred payment or notes are fully paid, and in default of any or all of the payments for the safe or conditions as agreed, you or your agent may, without process of law, take possession of and remove said safe, and retain any payments that may have been made on account of said safe, in lieu of the use of said safe, as rent or charges and damages on safe. All payments to be made to Purcell Safe Co. at the office of the company, Seattle, Wash. The undersigned agree to keep the above safe insured for its full value in a good company at its own expense, and in the

event of a fire this contract shall be a lien upon said insurance policy for the amount that may at that time be due upon this contract. In the event of failure to make payments when due, interest at the rate of ten per cent. per annum shall be paid upon such deferred payments from the time when due until paid, and if for any cause Purcell Safe Co. shall bring suit to recover possession of said safe in accordance with the terms of this contract, the undersigned agrees to pay attorney's fees and costs of court. It is understood and agreed by the undersigned that all the conditions of the order are contained in the above, that no verbal statement or agreements with the agent shall bind the Purcell Safe Co. to anything not written in the body of this order and that this order is not subject to be countermanded.

S. C. OSBORN CO.
S. C. OSBORN.

Salesmen are not allowed to collect for us. Any payments made to them will be at your risk.
PURCELL SAFE CO.

We request that the Court examine the original exhibit (Petitioner's Exhibit "1-A," copy shown on pages 19 and 20 of Transcript of Record) transmitted here for inspection by order of the Court below (Record, p. 41). That exhibit is substantially a fac-simile of the original order so far as concerns the form and manner of signing and the relation of the names of the parties thereto (Referee's certificate, Record, p. 29). It is to be noted that immediately following the signatures "S. C. Osborn Co." and "S. C. Osborn," appears a printer's rule extending across the entire face of

the instrument and cutting off what is below from what is above. Then are printed these words:

Salesmen are not allowed to collect for us. Any payment made to them will be at your risk.

PURCELL SAFE CO.

The order was a request to the Purcell Safe Co. to deliver the boxes; but there was no agreement or covenant that the Purcell Safe Co. was to, or would, do anything. S. C. Osborn Co. and S. C. Osborn were to perform every agreement set forth in the order. They were to keep every covenant. Everything was to be done by them. Nothing was to be done by the appellant. It made no agreement. It assumed no responsibilty. No liability was entailed upon it.

No intent is shown on the part of appellant to bind itself in any way whatever. As to it the order did not state the "terms and conditions" of the sale. The order was merely a proposal to the appellant, setting forth in detail what were the "terms and conditions" on which the bankrupt was willing to make the purchase. The writing does not show that the appellant ever accepted the proposal. The so-called agreement was absolutely unilateral.

The only signature claimed to have been made by the appellant is that following the instructions as to payments, appearing below the printer's rule. Those instructions were a warning that salesmen had no authority to collect, and that payments made to salesmen would be made at the risk of the payers.

Moreover, we have in this case the "Purcell Safe Company," a Washington corporation, claiming an adoption, as its signature, of the printed words "Purcell Safe Co." The laws of the State of Washington provide that the corporate powers of a corporation shall be exercised by the board of trustees (Rem. & Bal. Code, Vol. 2, Sec. 3686). The sole proof of such adoption is the testimony of Mr. Lynch, the sales manager (Record, p. 12):

"Our uniform plan was to use the printed form of which this is a copy. * * * No one was authorized or allowed to use any other form of signature or any other name except what was contained on that contract."

Judge Hanford correctly held below that the custom as proved could not override the statute (Record, p. 31):

"The evidence proves that part of the purchase price for the safe deposit boxes remains unpaid; that the Purcell Safe Company furnishes its agents printed blanks for such contracts, each of which has at the bottom its name, "Purcell Safe Co." printed; and that the contract in question was not signed by the vendor otherwise than by adoption by its officers of the printed name as its signature and the signing thereof in duplicate by the vendee. I do not mean to decide that a corporation may not by a resolution of its board of directors adopt a signature made by type and a printing press for authenticating its contracts; nor that the long continued practice of its officers in issuing contracts so authenticated may not estop it from repudiating obligations assumed in that manner, but I do concur with the referee in holding that the

custom as proved does not meet the plain requirement of, and can not override, the statute."

Such was also the view of Judge Hoyt, the referee. We think the opinion of Judge Hoyt is instructive, and therefore present same as follows:

"The instrument relied upon as constituting a conditional sale contract was in the form of an order directed to the Purcell Safe Co. and signed by S. C. Osborn Company and S. C. Osborn, and so far as the terms of the order were concerned the said Purcell Safe Co. was a party thereto only by reason of the fact of the order being directed to it. There was no agreement or covenant on the part of the said Purcell Safe Co. that it would do anything in the premises. The order was written upon the stationery of the said Purcell Safe Co., a corporation, which said stationery had printed thereon at the bottom below where the order was signed by the said S. C. Osborn the words 'Purcell Safe Co.' and nothing more.

"The evidence introduced showed simply that this order was filled out by an agent of the said Purcell Safe Co., signed by the said Osborn in his presence, and delivered by him in the ordinary course of business, and that in pursuance thereof the property described therein was delivered to the said S. C. Osborn, and thereafter and within the time provided by law the said instrument was duly recorded in the auditor's office of the proper county.

"Under this state of facts I am of the opinion that the sale became absolute, notwithstanding the recording of the order in the auditor's office, as hereinbefore stated, as in my opinion it was not signed by the vendor within the meaning of our statute, which requires a conditional sale contract to be signed by both parties thereto. It certainly was not signed by any affirmative act of the corporation,

or its agent, after it had been prepared, and if it could be held that the said vendor had signed it it would be by reason of the fact that there was an adoption of the signature printed on the blank by the agent at the time the order was presented, but the only testimony tending to show any such adoption was the fact that the agent testified that he intended what was done to constitute a proper making of a conditional bill of sale, and that the transaction was in the ordinary course of business, and I am of the opinion that no such adoption of the signature was shown as would make it from the date of such adoption the signature of the vendor corporation. What was done might have been sufficient to bind the corporation as to any agreement to be performed on its part by way of estoppel, but as has been before said, the corporation had agreed to do nothing, and for that reason any doctrine of estoppel could not be applied. The only object of the signing of the instrument by the vendor would be that when so signed and recorded, our statute as to conditional sales would be complied with, so that in my opinion the signature should be so placed upon the instrument to be recorded as to show a proper signing by the corporation, without resorting to extraneous proof as to the circumstances under which the instrument was signed."

The petition and adjudication in this case were filed and entered in December, 1910. As far as the Bankruptcy Act is concerned, the right of the trustee to the property in question is therefore governed by section 8 of the amended act of June 25, 1910, amending section 47a (2) of the Bankruptcy Act. That amendment provides:

"And such trustees, as to all property in custody, or coming into the custody, of the bankruptcy court, shall be deemed vested with all the rights,

remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."

Decisions holding that a trustee has no rights other than those which were vested in the bankrupt are therefore no longer controlling.

We submit that the decree of the Court below should be affirmed.

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